expressing their agreement. The decision against which the Commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of section 1154 of the Civil Procedure Code, and as such the Court could competently have granted leave to appeal from it to His Majesty in Council.

In the result the Commissioner is entitled to succeed in both the consolidated appeals. Their Lordships will humbly advise His Majesty in the procedure appeal that the appeal be allowed and the order of the Appeal Court of 9th January 1932 be recalled with a declaration that it was within the competence of the Court of Appeal to grant the leave to appeal craved in the petition which by that order was dismissed; and in the appeal on the merits, that the appeal be allowed, the order of the Appeal Court of 30th November 1931 and the order of Terrell, J., of 12th August 1931 be recalled and the case be remitted to the Supreme Court of the Straits Settlements with a direction to pronounce a judgment finding that the assets Nos. (10) to (17) inclusive of paragraph 9 of the Originating Petition No. 4 of 1931 are liable to estate duty in the Colony. The appellant will have his costs throughout, other than the costs relating to his petition to the Appeal Court for leave to appeal. The latter costs both below and before their Lordships he must himself bear.

Appeal Allowed.

Solicitors for the Appellant, *Burchells*, London: Solicitors for the Respondents, *Nisbet Drew & Loughborough*, London; *Drew & Napier*, Singapore.

(Appellate Civil Jurisdiction)

Murison, C.J., Burton & Whitley, JJ.

January 11 & 12, 1933.

Re Seow Im Swee Deceased.

SEOW BENG HAY.....Plaintiff. (Appellant).

vs.

SEOW SOON QUEE & anor.....Defendants. (Respondents).

(Singapore Civil Appeal No. 38 of 1932)

Chinese marriage—proof—presumption—Ordinance No. 53 (Evidence) Ss. 32 & 50.

In the absence of proof of a marriage ceremony the Court can upon proper circumstantial evidence presume a secondary marriage between a Chinese man and woman.

Ngai Lau Shia v. Low Chee Neo, 14 S.S.L.R. 35: *Cheang Thye Phin vs. Tan Ah Loy*, 14 S.S.L.R. 79: (1920) A.C. 369 followed.

In cases of pedigree even remote and slight evidence must be allowed effect. *Vowles v. Young*, 13 Ves. Jun. 140.

A Chinese can contract marriage with a *tsip* (secondary wife) without having first married a *tsai* (principal wife).

Woon Kai Chiang v. *Yeo Pak Yee*, (1926) S.S.L.R. 27. applied.

Appeal from the order of Terrell, J. dated the 9th August 1932.

The Plaintiff was the son of one Seow Soon Teck who died in 1927. The latter was alleged to be the son of Seow Swee Peng deceased who was the son of the abovenamed Seow Im Swee deceased under whose Will the defendants were the trustees. In an Originating Summons taken out by him the plaintiff asked for construction of the said Will. By his Statement of Claim the plaintiff claimed to be entitled to a share in the Estate of Seow Im Swee through his father who was a son of Seow Swee Peng deceased by his wife Boon Neo. The Defendants denied that the plaintiff was the lawful grandson or next of kin of Seow Swee Peng deceased. By the Order of Court dated the 18th March 1932 an issue was directed to be tried as to the legitimacy of Seow Soon Teck deceased.

Terrell, J. found that there was insufficient evidence to prove a lawful union between Seow Swee Peng and Boon Neo.

The relevant facts appear sufficiently from the Judgment of Murison, C.J.

The Plaintiff appealed.

Johannes for the appellant.

Soon Kim for the respondents.

Cur. Adv. Vult.

Murison, C. J.—This is an appeal against an order made by Terrell J. upon the simple issue whether one Seow Soon Teck was or was not a legitimate son of one Seow Swee Peng. The learned judge found that he was not.

The order directing the issue was made upon the 18th March, 1932 in an originating summons, taken out by Seow Beng Hay on the 4th March, 1932, asking for the construction of the will of one Seow Im Swee, deceased. The latter was the father of one Seow Swee Peng deceased, who is alleged to be the father of Seow Soon Teck who is the father of the Plaintiff in the issue Seow Beng Hay.

Seow Im Swee died on the 17th October, 1857 leaving a will of which the present trustees, under an order of Court dated 30th December, 1931 (Originating Summons 192 of 1931) are the first and second defendants Seow Soon Quee and Tan Teck Chye.

With regard to the will of Seow Im Swee it is necessary only to say that by clause 5 a certain piece of land was left in perpetuity as a burial ground, and that by clause 11 the residuary estate of the testator was left to Seow Swee Peng.

On the 4th January, 1932 the Government acquired this land, and the sum of $17,000 representing the

purchase price was paid to the Trustees' solicitors for the credit of the estate of Seow Im Swee. But by order of Court dated 18th March, 1932 the gift of the land for a burial ground was held to be invalid, and so the poceeds of the acquisition, this $17.000, fell into the residue of Im Swee's estate.

The order directing the issue to be tried said that the Plaintiff in the originating summons, namely, Seow Beng Hay should be Plaintiff in the issue, and the trustees of the estate, Seow Soon Quee and Tan Teck Chye should be defendants in the issue. And pleadings were ordered.

The Statement of Claim alleges that the Plaintiff's grandfather Seow Swee Peng died intestate in 1884 leaving him surviving two sons, Seow Soon Moh and Seow Soon Teck by his wife Boon Neo.

Seow Soon Teck died on the 18th October, 1927 leaving nine children of whom the Plaintiff is the eldest.

In their Defence the defendants deny that the plaintiff was the lawful grandson, or one of the next of kin, of Seow Swee Peng. They say that Boon Neo was not the lawful wife of Seow Swee Peng.

The trial of the issue followed, the onus being admittedly on the Plaintiff.

To prove his legitimacy the Plaintiff had to show that Swee Peng married Boon Neo as the principal wife or as a secondary wife and that he, the Plaintiff, was a grandson of such marriage.

The Plaintiff made no attempt to prove that Swee Peng married Boon Neo as a principal wife, that is, with the accompaniment of the usual Chinese rites and ceremonies. He contends, however, that there was a secondary marriage between them. For this no rite or ceremony is necessary. (Six Widows' Case (1908) 12 S.S.L.R. 120 and *Cheang Thye Phin* v. *Tan Ah Loy* (1920) A.C. at pages 209, 369).

There is an *obiter dictum* in a Judgment of my own to the effect that even if (as is the case) Swee Peng never married anyone as a principal wife, he could still contract a marriage with a *tsip* or secondary wife (*Woon Kai Chiang* v. *Yeo Pak Yee and others* (1926) S.S.L.R. page 27).

Such a marriage can be proved by oral or circumstantial evidence or both: that is, evidence can be brought to show that from events which have happened the Court will infer that a secondary marriage must have existed. The cases relative to this point are conveniently collected in Withers Payne's Law of Administration of and Succession to Estates, page 24 note (q).

The first point relied upon by the Plaintiff is in connection with the tombstone on the grave of his grandfather Swee Peng.

The learned trial judge held that this evidence was admissible, and I think this is the case. The judge finds as a fact, and apparently on good ground, that Seow Soon Teck erected the tombstone; and, as he is dead, section 32 (6) of Ordinance No. 53 (Evidence) would seem to govern the case and to allow the evidence to be given. Even if it were not proved who erected the stone, the evidence would still be admissible, for publicity, as it is said, supplies the defect of proof who erected. (*Monkton* v. *Attorney General* (1831) 39 English Reports, 350 at 357, and *Davis* v. *Lowndes* (1783), 134 English Reports 978 at page 1002).

A translation of this inscription on the tombstone is in evidence (exhibit A2). It is as follows:—

"(Here is) the grave of (our) late father Siau "Hock Beng (of the Village) of Au-Sua (whose "death occurred) In the Imperial Ching Dynasty.

"(On this) Lucky (day) of the third (literally "tong) moon in the (Chinese cycle year of Ka-sing "(or) the 10th dynastic year of (the Emperor) "Kwang-su, this stone is erected by (his) filial sons "Soon Teck (and) Soon Moh and (his adopted "children Soon Kim, Soon Ting (and) Soon Kheng.

"Translated by
Sd/ Mah Ki Keng
"Sworn interpreter of
"Supreme Court."

It is agreed that Siau Hock Beng is the burial name of Swee Peng. The word "filial" is not so easy. The original word is "howlan". The evidence as to the meaning of this word was scanty in the trial Court. The senior Court interpreter said it meant "filial". One witness, an undertaker, suggested that it might mean "adopted"; he would not say that it meant, in the context, actual sons even though it was followed by a reference to adopted sons.

In search of further information on the point we called the senior interpreter of the Court, who translated Exhibit A2 mentioned above. He said that by "filial" he meant "dutiful". He said the word carried no distinction in regard to legitimacy or illegitimacy or adoption and said "As long as the son carries the blood of his father he can call himself 'howlan.' "

The trial judge points out that as the Plaintiff's father himself put up the stone it is not likely that he would describe himself in any but the most favourable terms. He concludes that 'howlan' means natural sons; that is, I suppose, illegitimate sons.

The evidence of the senior interpreter (to whom incidentally I had to explain the difference between the words "legitimate" and "illegitimate", as he did not know it) and of the undertaker should carry, to my mind, very little weight. It is, I think, safer to rely upon the admitted two facts. The first of these is that a distinction on the stone is drawn between "sons" and "adopted sons". As to this the "sons" come first, and it is, I think, fairly clear that if the sons had been

illegitimate they could not have been put before adopted sons. Perhaps the safer way to put it would be that the family would not have allowed the inscripition to remain with these sons' names put first unless they were in fact legitimate. This brings us to the second fact which is that this inscription has stood for 48 years without any sign of protest or dissent from any of the family concerned. Now in this case the oral evidence is (as the trial Judge said) unreliable. It goes back sixty or seventy years. The facts to which I have referred are undeniable. In these circumstances the Court can, I think, place more reliance upon them than would have been the case had the oral evidence provided some reliable proof of a case inconsistent with the inscription. There is the authority of the Privy Council somewhere, but I cannot at the moment say where it is, for this proposition.

I conclude, therefore, that so far as the tombstone is concerned the evidence of legitimacy, though by no means conclusive, is distinctly supported by the inscription upon it. With all due respect I attach more weight to this point than the learned trial judge did.

The second point relied on by the Plaintiff relates to the recognition by the Seow family of Plaintiff's position as a legitimate son. Section 50 of Ordinance No. 53 (Evidence) is in point here. Subsection (1) and the Illustration (b) are as follows:—

> "When the Court has to form an opinion as to the "relationship of one person to another, the opinion "expressed by conduct as to the existence of such relation- "ship of any person who as a member of the family or "otherwise has means of knowledge on the subject, is a "relevant fact.
>
> Illustration (b) "The question is whether A was a "legitimate son of B. The fact that A. was always "treated as such by members of the family is relevant."

It is to be noted, however, that the treatment in question must be treatment as a legitimate son: treatment as a son is not sufficient.

In support of this argument it is pointed out that Soon Teck when a child was brought up in the family house of Im Swee in Nankin Street. Thus, the Defendant trustee Teck Chye says:

> "Afterwards Seow Swee Peng took him (Soon "Teck) to Nankin Street for education. Then "Soon Teck lived at Nankin Street."

and later on he says:

> "After Swee Peng's death I saw Boon Neo. I "said to her 'Is your son still living in the family "house?' She said 'Yes' ".

From this it is argued that Soon Teck must have been a lawful son for a concubine's son would never have been brought up in the family house. I asked Mr. Johannes, the appellant's counsel, if he had any evidence to prove that the Chinese custom was in accordance with his arguments, for there was no proof of such custom on the Record. The adjournment then took place and next day Mr. Johannes said he could not prove that such was the Chinese custom. I, however, pressed the point and eventually two expert witnesses in Chinese customs relating to the subject were called. The question to be put to them was agreed by counsel and was as follows:—

1. Soon Teck, for the purposes of this question, is assumed to be the son of Swee Peng and Boon Neo.
2. It is conceded that Swee Peng never married Boon Neo as a principal wife.
3. Soon Teck lived for some years in Swee Peng's, his father's house before Swee Peng died, and also for some years after Swee Peng died.
4. Do these circumstances, by Chinese custom, help in any way the presumption that Swee Peng at some time or other married Boon Neo as a secondary wife?

The first witness was Mr. S. Q. Wong, a well known and highly respected resident in Singapore. He is a Chinese 46 years of age and was born and has lived all his life in Singapore. He said, in answer, that a Chinese man can marry a *tsip* (secondary wife) without having previously married a *tsai* (principal wife). His opinion was that the Court could, in the circumstances given, reasonably infer that there had at some time or other been a secondary marriage between Swee Peng and Boon Neo. He said that there were cases, not many, where an illegitimate son lives before and after his father's death in the family house, but it was unusual. It would, however, he thought, be fairly usual for a Chinese taking an illegitimate son, born outside the house, to live in the family house.

The other witness was Mr. W. G. Stirling who is married to a Chinese lady. He was Assistant Protector of Chinese in the Straits Settlements Government from December, 1921 till May 1929. He agreed with the first witness except on one point. He thought that it would only be due to financial circumstances that an illegitimate son, born outside the house, was brought to live in the family house. Such a course would, in his opinion, be unusual.

One has, moreover, in this connection, to remember that it is a settled principle of law in these cases to refer an alliance between Chinese rather to a legitimate than an illegitimate connection.

I, therefore, accept this expert evidence as establishing the proposition that the Court, in this case would be justified in presuming that there was at some time or other a secondary marriage between Swee Peng and Boon Neo.

The next point relied upon in the question of family treatment was contained in the evidence of Seah Quee Neo, an adopted daughter of Swee Peng. She says that at one time she went to Siam with Swee Peng and her mother. Soon Teck did not go. But

when Swee Peng died in Siam Soon Teck came to Siam and took Swee Peng's body back to Singapore.

By itself this incident would not prove the Plaintiff's case; but it seems strange that if Soon Teck was merely the son of a concubine the other admittedly legitimate relatives of Swee Peng, for instance his brother, should stand by while this pious duty was performed by some one who is now contended to be completely outside the family. In other words, the conduct of the family in this matter appears to me definitely to contribute something towards the Plaintiff's contention.

The next point in regard to treatment by the family (and incidentally by the Defendant trustee) concerns the distribution of Im Swee's estate. I have given the facts relative to the $17,000 in Court. It is common ground in this case that all the beneficiaries and the trustees from the death of Im Swee in 1857 up till March, 1932 thought that his estate was distributable among his next of kin; and Soon Teck was accepted as one of such next of kin. That is, his legitimacy was not disputed. But in 1932 it was discovered that by clause 11 of Im Swee's will the residue of Im Swee's estate went to Swee Peng, and on Swee Peng's death therefore to Soon Teck as the sole next of kin of the sole residuary legatee Swee Peng. It was only then that any record appears of a claim that Soon Teck was illegitimate. This is shown by Teck Chye's answer on the 10th March (in his affidavit of that date, paragraph 4) to the Plaintiff's claim for the whole residue as sole representative of his father. In fact it is proved that before this date Teck Chye as trustee, still thinking that the $17,000 was divisible between the three surviving next of kin of Im Swee, namely, (1) Tan Poey Neo, wife of Teo Siang Eng (2) Soon Teck and (3) Seow Sam Neo, actually paid to Tan Poey Neo a sum of $5050 which is said to represent one-third share of $17,000 less a sum retained for costs. At this point there was no question raised by anybody as to Soon Teck's legitimacy; otherwise the $17,000 would have been divided into two shares, not three. But directly Teck Chye, on the discovery of the true construction of the will, claimed the whole residue, the question of legitimacy is immediately raised. See *Rajendro* v *Jogendro* (1871) 14 Moo. I.A. 67, and Ameer Ali on Evidence, 7th edition page 467.

In my opinion these circumstances constitute treatment (by the family and by the trustees) of Soon Teck as a legitimate son of Swee Peng, and they distinctly assist him to establish his claim.

The next point relied on in regard to treatment concerns the funeral of Swee Peng after his body had been brought back to Singapore. It is common ground that Soon Teck and others were the principal mourners. Now Swee Peng's brother was alive then, and in Singapore, and in fact at the funeral. There were other relatives and adopted sons present. Ceremonial procedure at a funeral is of much more importance to a Chinese than it is to an Englishman. And so it seems strange in these circumstances that if Soon Teck were only the son of a concubine he should be allowed to take a principal part in the funeral ceremonies while relatives of the full blood and even adopted sons looked on. The readily apparent answer, of course, is (as is shown by the division of the $17,000 above referred to) that none of the family, nor the defendant trustees, ever thought of challenging Soon Teck's status as a legitimate son. He would otherwise never have been allowed to be a principal mourner, nor to have arranged for either the erection of the tombstone or the making of the inscription on it.

The next matter relied upon by the Plaintiff concerns the alleged cohabitation of Swee Peng and Boon Neo. This, with repute added, is a ground for inference of marriage between Chinese. The law upon the subject has been often stated by the Privy Council. I refer to *Cheang Thye Phin* v. *Tan Ah Loy* (1920) A.C. at page 375 and *Ma Wun Di* v. *Ma Kim* (1907) 35 Calc. 232. In the latter case it was held that the cohabitation must be by habit and repute and that repute must be among some sort of neighbours or a public, large or small.

The facts relating to cohabitation in this case are, as they all happened some 70 years ago, rather difficult to ascertain. It is not known when Soon Teck was born (but it must have been about 1864). Swee Peng and Boon Neo first appear as living with Soon Teck in Bencoolen Street 55 years ago, i.e. in 1877. The evidence on this point is provided by Soh Lye Neo. The trial judge says one should not rely on this unsupported evidence but he does not reject it as bad evidence. He prefers the evidence of Hoi Neo and (though she is an interested witness) Hay Luan. They both say Swee Peng never married. I, therefore, do not rely upon cohabitation in Bencoolen Street.

But in 1881 they appear again as going to Siam together, Soon Teck being left behind in Singapore. This is admitted. How long they stayed in Siam is fixed by Swee Peng's death there in 1884, for it is in evidence that Boon Neo survived him; so that anyhow they apparently cohabited during their sojourn in Siam. That would make a period of some three years. A difficulty here is the gap between 1864, when apparently Soon Teck was born, and 1877 in which year is the first evidence of Boon Neo's connection with the family.

In any event, therefore, it is clear that there was cohabitation for a period of about three years—cohabitation in a foreign country when Boon Neo went with Seow Swee Peng to Siam. But there appears to be no very reliable direct evidence of repute, among neigh-

bours or any kind of public, of such cohabitation. All we have is the evidence on the record which the trial judge did not think much of. Upon the whole I rather doubt if the evidence on this point is sufficient to establish the Plaintiff's case, although if repute may after seventy years be gathered from what evidence we have, the circumstances would support the Plaintiff's case.

I ought to refer to the *sin-chew* tablets. After Swee Peng's death Soon Teck and his uncle and a number of relatives were all living in the family house. The *sin-chew* tablets were there. It is argued that if Soon Teck had been legitimate he would have had his own house and taken them there, and not left them in his uncle's house. But the family house, I understand, was as much Soon Teck's house as the uncle's home. They all lived in the house together as the family house. I do not see therefore, how this matter affects the case one way or the other. I know of no Chinese custom which says that the son of a deceased must have a house of his own, and not live in a family house, and that the *sin-chew* tablets must be kept in the son's private house.

I have had some doubt about this case, but with great respect for the judgment of the learned trial judge I am upon the whole inclined to think that there are certain undeniable circumstances which appear to me to be inconsistent with the theory of Soon Teck's illegitimacy. These facts concern the treatment of the plaintiff's father Soon Teck by his family in regard to the conduct of the funeral of Swee Peng and the erection of and inscription on the tombstone; the circumstances of the distribution of the $17,000; Soon Teck's education and residence in the family house before and after his father's death; and the transport by Soon Teck of Swee Peng's body from Siam. In my opinion these facts (and especially the evidence as to residence after Swee Peng's death as given by Mr. Wong and Stirling) sufficiently support the presumption that Soon Teck was legitimate son of Swee Peng, and that, therefore, there was a secondary marriage between Swee Peng and Boon Neo.

I would, therefore, allow the appeal.

As to costs I would allow the trustees their solicitor and client costs here and below as a first charge upon the estate of Swee Peng, such costs to be paid first out of the shares of those beneficiaries who through the trustees have opposed the Plaintiff's claim and so far as they are insufficient, out of the Plaintiff's share of Swee Peng's estate.

The plaintiff then must have his solicitor and client costs out of which is left of the shares of the beneficiaries (other than himself) of the estate of Swee Peng.

Burton, J.—This appeal is concerned with the simple issue whether Seow Soon Teck was or was not the son of Seow Swee Peng. Seow Swee Peng died some forty-five years ago, and the oral evidence adduced is obviously unsatisfactory and of very little value. Much of it is the hearsay evidence of old men and women speaking to facts which were told them in their youth. As Terrell J. said, "The *viva voce* evidence on both sides after the lapse of fifty or sixty years was extremely meagre and unsatisfactory, and I prefer to rest my finding on the fact that the onus is on the plaintiff to prove a secondary marriage between Seow Swee Peng and Seow Soon Teck's mother."

Apart however from the oral testimony which Terrell J. seems to have abandoned there are a number of facts and admissions emerging from the evidence, upon the probative force of which in my view the determination of this case must depend. In the case of *Vowles* v. *Young*, (1806) 13 Vesey 140 at p. 145 Erskine, L.C. said:—

> "The evidence, especially in the case of obscure families, must be very slight; for if the party is legitimate, the question is never made; nothing is said upon it."

The first piece of evidence is the tombstone of Swee Peng.

This contains the inscription as we have it translated:—

"This stone is erected by his filial sons Soon Teck and Soon Moh and his adopted children Soon Kim, Soon Ting and Soon Kheng." One of the witnesses Tan Swee Tin, the high priest of the Leong San Si temple, who did not know the family, infers from the tombstone that the two sons are the principal mourners and sons of the deceased's own blood. The Chinese word used is "How Lan," and that has given some trouble. The interpreter translated it "filial sons" and in evidence before this Court explained that he meant "dutiful sons." Another witness Chua Hoo Cho, an undertaker, says the words mean "male mourners" and finally summed up his opinion in the words—

"I am not prepared to say that 'how lan' in this context means actual sons even though it is followed by reference to adopted sons."

The finding of Terrell J. is, I think, not quite consistent.

In one place he says—

"The conclusion I draw from the above facts is that Seow Soon Teck was either a son legitimate or illegitimate of Seow Swee Peng or an adopted son" and in another place he says:

"It appears to me that in its present context, and as adopted children are specifically referred to, 'how lan' can only mean natural sons."

This latter inference commends itself to me in preference to the former, but if Terrell J. means the word "Natural" to be limited to its usual connotation of "illegitimate" I am not prepared to follow him the whole way in this inference. The proper inference to

my mind is that 'howlan' must here mean 'sons', but that no definite inference can be drawn as to the legitimacy of the sons from the inscription alone.

There is however an indication from the position of the words that the two sons Soon Teck and Soon Moh were superior in status to adopted sons, because their names are mentioned first and it would be strange to give illegitimate sons the place of honour on a father's tombstone. It may be that this is discounted by the fact that Soon Teck put up the memorial himself, but even then it must be remembered that this memorial has stood for more than forty years, and has been the subject of family worship annually on all Souls' Day. Moreover it was admitted by one of the defendants, Tan Teck Chye, that Siow Eng the brother of Swee Peng would share the responsibility for setting up the tombstone.

The next fact to be considered is the part taken by Soon Teck in the funeral of Swee Peng. Tan Swee Tin, as I have said, infers from the tombstone that the two sons were the principal mourners, and as the name of Soon Teck is first and he was the elder, it follows that he was the principal mourner.

Terrell J. finds—

"I also find that Seow Soon Teck was one of the principal mourners at the funeral."

But Tan Teck Chye, a defendant, admits

"I attended Swee Peng's funeral. Soon Teck was the principal mourner and others."

It appears therefore that Terrell J's finding does not go as far as the evidence. It is also admitted that Siow Siang Eng, the brother of Swee Peng, was present at the funeral, and it is difficult to believe that if Soon Teck who was then a lad of twenty was not fully accepted by the family as legitimate, Siang Eng would have allowed him to be chief mourner.

But Soon Teck did more than attend the funeral as principal mourner. Swee Peng died in Siam. He had lived long in Siam and Soon Teck had not been with him, but had been living in Singapore. But it was Soon Teck who was deputed by the family to go to Siam to escort the body of Swee Peng from Siam to Singapore for burial. It is to my mind highly improbable that if Soon Teck was illegitimate and had been living away from his father for some time, he would have been chosen for this task. The other son, Soon Moh, was living at the time of the funeral. It is also clear that Soon Teck lived in the family house in Singapore both before and after his father's death. Tan Teck Chye admits this in his evidence.

"Afterwards Seow Swee Peng took him to Nankin Street for education. Then Soon Teck lived at Nankin Street. Nankin Street was the family house."

and later,

"After Swee Peng's death I saw Boon Neo. I said to her 'Is your son still living in the family house?' She said 'Yes'. I did not ask her who was supporting her". I found it difficult to believe that Soon Teck would be allowed to live in the family house after the death of Swee Peng, when his mother, Boon Neo was (as Tan Teck Chye seems here to admit) living elsewhere, unless he was a recognised member of the family; and it seemed to me that this fact alone was almost enough to dispose of the suggestion that Soon Teck was the offspring of a casual union with a mistress. But the further evidence called in this Court has confirmed me in this view. Mr. S. Q. Wong, a well known Straits-born Chinese who has lived in the Colony all his life, stated that from the fact that Soon Teck lived in the family house both before and after the death of Swee Peng, in his opinion the Court might reasonably infer that Swee Peng did marry Boon Neo as a *tsip*. And the other expert witness Mr. W. G. Stirling agreed with him. I think however that the evidence of these two gentlemen goes no further than to state that by Chinese custom an illegitimate son is not usually accepted into the family house after the death of his father and I understood Mr. Stirling to mean that though such was the general rule, it might be broken by reason of exceptional circumstances and he instanced poverty. No such exceptional circumstances however have been shown to exist in this case. But it is denied that Boon Neo was a *tsip*.

In *Cheang Thye Phin* v. *Tan Ah Loy*, (1920) A.C. 369 the Privy Council have recognised that a Chinaman may have secondary wives, *tsips*, whose children are legitimate, and held that no ceremony was necessary to constitute such a marriage. In *Yeap Cheah Neo* v. *Ong Cheng Neo*, L.R. 6 P.C. 381 Sir Montagu Smith in delivering the judgment of the Privy Council said:

> "It is said that, with the Chinese, the difference between the social status of a wife and that of a concubine, and in the position and treatment of legitimate and illegitimate children is so slight, that what is termed reputation affords no satisfactory ground for presuming a marriage. But if this be so, which, however, is not very clearly established, their Lordships see no reason, in the absence of satisfactory evidence to the contrary, why the ostensible relations of the parties should not be referred to a legitimate and correct connection, rather than to an illegitimate and, to say the least, a less correct one."

The evidence of cohabitation is meagre, But in her affidavit of 17th March 1932 Tan Poey Neo whose evidence Terrell J. found so unsatisfactory that he rejected it *in toto*, said

"The said Boon Neo then adopted a baby boy who was named Seow Soon Teck."
and also
"The said Seow Swee Peng was not married, and he had no secondary wife but he kept a mistress known as Boon Neo....." The statement that Seow Soon Teck was an adopted son is, as I have attempted to show, untrue, but Tan Poey Neo is a defendant, her interests conflict with the Plaintiff's and I think that it may be legitimately inferred from these statements, regarded as admissions, that Swee Peng and Boon Neo were living together when Soon Teck was a baby boy. Tan Poey Neo is now, as she says, 74 years of age, and she is speaking of the time of her marriage, so that these statements are probably referable to the early years of the decade beginning in 1870.

There is also the evidence of Soh Lye Neo, a disinterested witness, that Swee Peng lived with Boon Neo and Soon Teck and a maidservant in Bencoolen Street. This must have been about 1879. Terrell J. appears to accept this evidence, although he refuses to draw the inference of marriage from it. And though the dates are very uncertain, this cohabitation in Bencoolen Street must have been several years after the cohabitation referred to in Tan Poey Neo's affidavit.

About two years later Swee Peng went to live in Bangkok. There is evidence that Boon Neo went to Bangkok and predeceased him there, and there is evidence that she stayed in Singapore and survived him. It is impossible to say which is the truth, and in the result the evidence must be left negative on this point.

That is all the evidence of cohabitation, and it is admittedly meagre, but to my mind it does indicate that Boon Neo's was a more permanent relationship to Swee Peng than that of a casual mistress. But if this evidence is taken together with the evidence of the tombstone that Soon Teck was the principal mourner at the funeral of Swee Peng, that he went alone to Bangkok to fetch the body, and that he was taken to live in the family house after the death, I think that there is a very strong inference that Soon Teck was regarded by the family as legitimate, and consequently there is also an equally strong inference that his mother Boon Neo was the lawful wife of Swee Peng.

I am very strongly confirmed in this view by the affidavit of the defendant Chua Hay Luan sworn on 10th March 1932. The fund now claimed only recently came into existence. Seow Im Swee's will had provided for a piece of land to be reserved as a family burial ground. The land was acquired by the Crown in 1931 and the purchase price $17,000 was paid into Court. The present Trustees then got themselves appointed. The family was first advised that there was an intestacy as regards this sum of money, and that it was divisible among the next of kin of Seow Im Swee. The next of kin of Seow Im Swee, apart from Seow Beng Hay the present Plaintiff, woud be Tan Poey Neo, representing the share of Siang Eng deceased, and Chua Hay Luan and Chua Lek Luan representing the share of Seow San Neo the daughter of Im Swee.

In this affidavit Chua Hay Luan is claiming a share in the fund on the basis of an intestacy, as is clear from paragraph 7.

"I say that the sum of $17,000 derived from the sale of land.....is an intestacy and the said sum should be distributed among the next of kin of the said Seow Im Swee deceased" In paragraph 4 of the affidavit she says.—

"Seow Swee Peng died leaving a son Seow Soon Teck" and this affidavit is re-inforced by another sworn on the same day in which she repeated this statement and also attached a pedigree in which Seow Swee Peng is marked as "died leaving issue." On the strength of this affidavit she was called by the plaintiff but the evidence she gave in the case was quite different, and the divergence is explained by the change of attitude of the family. No objection was raised to the plaintiff's claim as long as he was content with a third share on an intestacy; but the answer to his claim to the whole fund as residue was the allegation of illegitimacy. The affidavit of Chua Hay Luan throughout assumes the legitimacy of Soon Teck, and the right of his issue to share on an intestacy.

A further argument was addressed to us on the facts. The defendant Tan Teck Chye, one of the Trustees, has already paid $5,050 to his sister Tan Poey Neo. It was argued that this payment represented a one-third share of the $17,000, less a deduction for costs. But if (as the family alleges) the plaintiff is illegitimate the sum of $17,000 falls to be divided into two equals parts, one to go to Tan Poey Neo and one to Seow Sam Neo's daughters. Tan Teck Chye explains the payment.—

"I did that because I was sure that there were no others except Tan Poey Neo and two daughters of Seow Sam Neo."

But if this were the true reason, it is argued, he should have divided the sum of $17,000 into two parts, and this leaves the sum of $5,050 without an explanation, for if it was an advance of her share, it would more probably have been $5,000 a round sum.

But I am unable to attach any weight to this argument. The explanation is that she was paid $5,050 because that is the sum she asked for, and there is no explanation as to why the sum of $1,850 was retained for costs.

In one case I think that Terrell J. has drawn an inference adverse to the plaintiff without justification. He says:

"I also find that Seow Swee Peng.....although he was the eldest son, the *Sin Chew* tablets including his own are kept in the house of his younger brother's family (sc. Siang Eng). The latter fact, which is not disputed, is an indication, though also not conclusive that the eldest branch had no descendants." This inference clearly influenced Terrell J's judgment, but I think it is founded on a misapprehension, because Swee Peng died in Siam and at the time Soon Teck, a boy of twenty, was living with his uncle in the family house in Nankin Street, and, as I have said, he continued after the death of Swee Peng to live in the family house. He had no house of his own and there was therefore no other possible place for these *Sin Chew* tablets to go. It is true that the plaintiff gives a different explanation when he says that the *Sin Chew* tablets were not put in Soon Teck's house "because there was no place to pray and he had no money for prayers." But he is obviously speaking of things which happened before he was born, and in suggesting an explanation which may have been true later when Soon Teck went to live in a house on the burial ground, but which can have no relation to the undisputed facts.

On the whole case therefore I conclude that Soon Teck was the legitimate son of Swee Peng, and that he and his son the present plaintiff have always been treated as legitimate by the family until the commencement of the present proceedings, and I think the marriage of Swee Peng and Boon Neo, even though specific evidence of it has not survived, may be fairly inferred from the circumstances. Evidence that goes to show Soon Teck's legitimacy is equally cogent, in my opinion, to show the marriage between Boon Neo and Swee Peng. If the conflicting oral evidence is discarded, and I understand that Terrell J. did discard it, all the evidence that is left points to the legitimacy of Soon Teck. It may not be very strong, but in the circumstances I think it is sufficient.

At the best however Boon Neo was only a *tsip*, and there is no evidence that Swee Peng ever married a *tsai*. No point was made of this in argument, and I think it is a fair inference from the case of *Woon Kai Chiang* v. *Yeo Pak Yee*, (1926) S.S.L.R. 27 that a Chinese may contract a legal union with a *tsip* without marrying a *tsai*, for although Brown J. says in his judgment, at p. 47.

"I should perhaps make it clear that I have assumed throughout this judgment that a Chinese cannot take a secondary wife before he marries a principal wife. If it were possible to hold that he could do so, there would be no difficulty in view of the decision of the Privy Council in *Cheang Thye Phin* v. *Tan Ah Loy* (1920) A.C. 369 in drawing the presumption in the present case....." and Reay J. agrees with him, they nevertheless held that the union between Woon Hong On and Chan Yat Quan was a valid *tsip* marriage, and this marriage must have taken place some seven years before the *tsai* marriage of Yeo Pok Yee.

I think therefore that this appeal should be allowed.

I agree with the order for costs proposed by Murison C. J.

Whitley, J.—I have had an opportunity of reading the judgment of the learned Chief Justice with which I am in entire agreement. I have little to add. Like him I at first felt considerable doubt about the case but I now feel satisfied that the cumulative effect of the admitted circumstances which he has analysed in detail is more consistent with the legitimacy than with the illegitimacy of Seow Soon Teck. I agree with the learned trial Judge that it is unsafe to place much reliance upon oral evidence, necessarily mostly hearsay, as to events which happened some fifty years ago. Even when not hearsay the evidence consists of the recollections of persons who were of very tender age at the time of the events which they are trying to recollect. Such circumstantial evidence as is available accordingly affords much more reliable material upon which to solve the difficult question which the Court has to decide in this case.

The onus is upon the Plaintiff but in considering whether the evidence which he is able to adduce is sufficient to discharge that onus it has to be borne in mind as Lord Erskine observed in *Vowles v. Young*, 13 *Vesey Junior* 140, that in cases of pedigree remote and slight evidence must be allowed effect. That was a case in which the only point was a question of legitimacy and the following passage from his judgment at page 143 lays down the principles upon which the Court should act:—

> "Courts of Law are obliged in cases of this "kind to depart from the ordinary rules of "evidence; as it would be impossible to establish "descents according to the strict rules, by which "contracts are established and subjects of property "regulated; requiring the facts from the mouth "of the witness, who has the knowledge of them. "In cases of pedigree therefore recourse is had to "a secondary sort of evidence: the best the nature "of the subject will admit; establishing the descent "from the only sources, that can be had."

and again at page 145:—

> "The evidence, especially in the case of ob-"scure families, must be very slight; for, if the "party is legitimate, the question is never made."

Those observations would seem to apply with at least equal force to a Chinese family in Singapore.

Upon the whole I feel that the evidence more especially the circumstantial evidence is sufficient to establish the Plaintiff's case and I would allow the appeal.

I agree with the proposed order as to costs.

Appeal allowed.

Solicitor for Appellant— *Johannes & Sammy.*

Solicitor for Respondent— *Kow Soon Kim.*

(Original Civil Jurisdiction)

TERRELL, J.

December 30, 1932.

In the Matter of certain parts of the Estate of Khoo Cheng Teow devised by his Will dated the 19th day of December 1895.

and

In the matter of the Civil Procedure Code Section 68 (8).

THE BRITISH MALAYA TRUSTEE & EXECUTOR CO., LTD. the present trustees of the Will of KHOO CHENG TEOW deceased).....Plaintiffs.

vs.

KHOO SENG SENG (the Administrator of the Estate of KHOO KOK OON deceased) Defendant.

(Singapore Originating Summons No. 187 of 1932).

Trust—devise—Sin Chew—*superstitious uses.*

Gifts for *Sin Chew* purposes are neither void as being gifts for superstitious uses nor void under the law of the Straits Settlements. *Siow Ah Yen* v. *Siu Ah Chit*, 1 Quarterly Notes No. 4 applied. *Bourne* v. *Keane*, (1919) A.C. 815 distinguished.

An Originating Summons asking for the determination of certain questions arising out of the Will of Khoo Cheng Teow deceased, heard by Terrell, J.

The material question for determination arose under clause 5 of the Will and concerned the devise of No. 56 Church Street Singapore for purposes of maintaining *Sin Chew* ceremonies. The material parts of Will are set out in the Judgment.

Charlesworth for the plaintiffs.

Burke for person appointed to represent residuary legatees.

Withers Payne for Khoo Guan Hoe representing next of kin.

Cur. Adv. Vult.

Terrell, J.—The Originating Summons concerned two properties No. 56 Church Street and No. 241 Teluk Ayer Street, Singapore, which passed respectively under clauses 5 and 4 of the Will of Khoo Cheng Teow and are the only properties now remaining subject to the trusts of the Will.

As regards No. 241 Teluk Ayer Street there is no particular difficulty. Under Clause 4 of the Will the nett rents were to be divided during the lives of the testator's sons and adopted sons among such of his sons adopted sons as should become literate in China or a graduate of an English, Scottish or Irish University. None of the testator's sons or adopted sons has so qualified and the only survivors are Khoo Kok Poh and Khoo Kok Keat. The latter by consent dated the 17th October 1932 and filed in these proceedings has consented to forego his rights to qualify under that clause, and Khoo Kok Poh has likewise foregone his rights by his affidavit filed herein on the 13th October 1932 and by the consent of his counsel at the Bar. The objects of clause 4 have accordingly come to an end and according to a well accepted rule of law the subject matter of the devise is caught by the residuary gift. I direct, therefore, that this property be sold with the approbation of the Court and the proceeds distributed as if it were part of the residue. Any of the beneficiaries are to have liberty to bid. The trustees will be entitled to a commission of 2½ (two and a half) per cent which I allow to them by virtue of Section 43 of the Trustees Ordinance 1929.

As regards No. 56 Church Street different considerations arise. The devise is "during the lives of Her Majesty Queen Victoria and her descendants now in being and during the lives and life of the survivors and survivor of them and during the period of twentyone years after the death of such survivor" to let the premises etc. and "to apply the balance of such rents from time to time in the performance of the religious ceremonies according to the custom of the Chinese called *Sin Chew* to perpetuate my memory".

It is clear that the devise does not offend the Rule against perpetuities. If the devise is bad it can only be because the object of the devise is the performance of ceremonies which are to be deemed to be superstitious and prohibited by law on the ground of public policy or illegality.

The only reported case on the subject is a Malacca case *Siow Ah Yen* v. *Siu Ah Chit* decided by McCabe Reay, J. on May 4th 1927 and reported in No. 4 of Vol. 1 of the Quarterly Notes of Cases decided in the Supreme Court of the Straits Settlements. The report is very short and the learned Judge held that a devise for 21 years for the object *inter alia* of "the upkeep of the testator's death tablet and the sacrificial offerings to his soul" did not offend the rule against perpetuities and was not against public policy as a superstitious use. The learned judge professed to be following the ruling in *Yeap Cheah Neo* v. *Ong Cheng Neo*. L.R. 6 P.C. page 381. The decision in the last named case was that a gift for *Sin Chew* purposes was bad as offending the rule against perpetuities and as not being a charity. It cannot be cited as an authority for anything else.